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IN THE

Supreme Court of the United States

October Term, 1929.

No. 414

THOMAS W. WHITE, COLLECTOR OF INTERNAL REVENUE,

Petitioner,

vs.

HOOD RUBBER COMPANY,

Respondent.

RESPONDENT'S BRIEF

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No. 414

THOMAS W. WHITE, COLLECTOR OF INTERNAL REVENUE,

Petitioner,

vs.

HOOD RUBBER COMPANY,

Respondent.

RESPONDENT'S BRIEF

STATEMENT OF THE CASE

This is a suit brought by the Respondent in the District Court for the District of Massachusetts for the recovery of additional income and excess-profits taxes for the year 1918, in the sum of $39,043.99 (together with interest thereon from Deecember 15, 1926), which taxes were collected by distraint by the Petitioner.

The suit was commenced on January 12, 1928 (R. p. 1).

By stipulation in writing (R., p. 14) the parties waived a trial by jury. The case was tried upon an agreed statement of fact (R. p. 14 et seq.) on July 26, 1928, the Honorable James A. Lowell, District Judge, presiding.

The court, in an opinion handed down on August 29, 1928 (R. p. 18 et seq.), ordered judgment to be entered for the Respondent.

Motion for entry of judgment forthwith (R. p. 18) was allowed on November 27, 1928, and judgment was that day entered for the Respondent in the sum of $39,043.99, together with interest amounting to $4,568.15, and its cost of suit (R. p. 18).

On October 8, 1928, the Petitioner duly filed its Bill of Exceptions (R. pp. 21–22), which said bill was allowed on November 14, 1928 (R., p. 23).

On January 24, 1929, the Petitioner duly filed its Petition for Appeal to the United States Circuit Court of Appeals for the First Circuit, which said petition was allowed (R., p. 23). Assignment of Errors was duly filed by the Petitioner on January 24, 1929 (R. p. 24).

The cause came on to be heard before the Justices of the said United States Circuit Court of Appeals for the First Circuit on April 16, 1929, and in an opinion handed down on June 25, 1929 (R., p. 25 et seq.), said Court affirmed the judgment of the District Court, judgment thereon being entered on said June 25, 1929 (R. p. 31).

The Petitioner on September 23, 1929, filed in this Court a Petition for Writ of Certiorari to the said United States Circuit Court of Appeals for the First Circuit, which petition was granted on October 28, 1929 (R. p. 31).

STATEMENT OF THE FACTS

The Respondent on March 14, 1919, filed with the proper Collector of Internal Revenue an income and excess-profits tax return for the calendar year 1918. Said return was designated as a "Tentative Return"

and the form used was the form prescribed and furnished by the Treasury Department, known as "Form 1031-T" (R. pp. 14, 15). Exhibit A, R. p. 5.) The precise form of this return is the same as that found in the brief for Petitioner (between pages 10 and 11) in the case of Florsheim Brothers Dry Goods Company v. United States of America, which said case has by order of the Court been joined with this case, and which said form is incorporated herein by reference.

The Respondent paid at the time of filing said return, on account of taxes due, the sum of $75,000, and upon demand from the Collector of Internal Revenue paid on June 16, 1919, the further sum of $75,000, the same being the second instalment of taxes due as shown by the return filed on March 14, 1919 (R. p. 15).

The time for filing a completed return for the calendar year 1918 having been extended by the Commissioner of Internal Revenue to July 14, 1919, the Respondent on said later date filed such a completed return, from which it appeared that the total tax due from the Respondent for the calendar year 1918 amounted to $169,772.65. The Respondent, having prior thereto paid $150,000 on account of said tax, duly paid the balance, i. e., $19,773.65, on December 12, 1919 (R. p. 15).

On January 26, 1924, the Respondent and the Commissioner of Internal Revenue entered into an agreement the pertinent provisions of which are as follows:

"January 25, 1924.

"Income and Profits Tax Waiver

"In pursuance of the provisions of Subdivision (d) of Section 250 of the Revenue Act of 1921,

> Hood Rubber Company and Affiliated Companies, of Watertown, Massachusetts, and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of the said Companies for the year nineteen hundred and eighteen under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax Acts. * * * This waiver is in effect for a period of one year after the expiration of the statutory period of limitation, or the statutory period of limitation as extended by any waivers already on file with the bureau, within which assessments of taxes may be made for the year or years mentioned." (Exhibit B, R. p. 7.)

This agreement was duly executed by both parties. (R. p. 15.)

Thereafter the Commissioner of Internal Revenue determined that additional taxes of $249,131.96 were due from the Respondent for the calendar year 1918, and notified the Respondent to that effect on February 16, 1924. The amount of said additional taxes was subsequently reduced to $191,978.98, which amount was assessed to the Respondent on March 18, 1925. (R. p. 15.)

The amount so assessed was again reduced to $49,405.34. The Petitioner applieed to the reduction of this amount a credit of $10,361.35 which had previously been allowed to Respondent as an overassessment for the year 1919, leaving as the net amount of additional taxes alleged to be due the sum of $39,043.99. (R. p. 16.)

Thereafter a warrant of distraint issued for the collection of said sum, and, acting under said warrant, on December 15, 1926, a Deputy Marshal of the United States levied upon and seized money of the

Respondent in the amount of $39,043.99 and paid said money so seized to the Petitioner.

On December 15, 1926, Respondent made a formal protest to the Petitioner, and demanded the return of the money so seized. (Exhibit C, R. p. 8.) (R. p. 16.)

On January 10, 1927, the Respondent filed with the Petitioner claim for refund of said sum of $39,043.99 (Exhibit D, R. p. 8), which claim for refund was rejected by the Commissioner of Internal Revenue on November 3, 1927. (Exhibit E, R. p. 13.) (R. p. 16.)

On January 12, 1928, the Respondent brought this action to recover the sum so levied upon and seized, together with interest thereon from December 15, 1926.

ARGUMENT

Since the issues in this case are precisely the same as in the case of Florsheim Company v. United States, above referred to, and since the cases are to be presented together, the Respondent herein adopts in toto the arguments set forth in the Petitioner's Brief in said Florsheim Case and asks that they be incorporated herein without reiteration.

The following may be considered as supplementing Petitioner's Brief in said Florsheim case:

The issues raised are the same as in the Florsheim case, viz.:

I. Whether the return on Form 1031-T was "the return" within the meaning of the Statutes?

II. Whether the period of limitation applicable to the collection of the taxes in question was established by the agreement of January 26, 1924, and if so,

whether said agreement remained unaffected by the subsequently enacted Revenue Act of 1924?

I.

FORM 1031-T WAS "THE RETURN" WITHIN THE MEANING OF THE TAXING STATUTES.

1. Form 1031-T Required an Estimate of the Amount of Tax Due and Required the Payment of at Least One-Quarter of This Amount at the Time of Filing.

Section 239 (a) of the Revenue Act of 1918 (40 Stat. 1057) provided:

> "That every corporation subject to taxation under this title * * * shall make **a return** stating specifically the items of its gross income and the deductions and credits allowed by this title. **The return** shall be sworn to by the president, vice-president or other principal officer and by the treasurer or assistant treasurer."

Section 241 (a) of the same Act (40 Stat., 1075) provided that the time for filing such return should be the same as provided in Section 227 (a) (40 Stat., 1081), which reads as follows:

> "That returns shall be made on or before the fifteenth day of the third month following the close of the fiscal year, or, if **the return** is made on the basis of the calendar year, then **the return** shall be made on or before the fifteenth day of March."

To make proper provision, however, for those taxpayers who for good and sufficient reasons were unable to comply with the requirement as to the time of the filing of their returns it was provided in Section 227 (a) of the same Act (40 Stat., 1075) that—

> "The Commissioner may grant a reasonable extension of time for **filing** returns, whenever in his judgment good cause exists."

And Section 250 (a) of the same Act (40 Stat., 1082) makes the further provision that—

> "Where an extension of time for filing a return is granted, the time of payment of the first installment **shall be postponed** until the date of the expiration of the period of extension."

The above-quoted sections of the law are definite and certain that a single return was contemplated. For example, Section 239 (a) reads "shall make **a** return"; Section 227 (a) provides: "**The** return shall be made on or before the fifteenth day of March"; and Section 250 (a) reads: "Where the extension of time for filing **a** return is granted"; all of which clearly indicates that not any return or many returns, but **one return,** is required of the taxpayer, and Section 227 (a) is equally definite and certain that it is the time for **filing returns** which the Commissioner is authorized to extend.

Section 1309 of said Revenue Act of 1918 (40 Stat. 1143) provides:

> "That the Commissioner, with the approval of the Secretary, is hereby authorized to make all needful rules and regulations for the enforcement of the provisions of this Act."

In accordance with the foregoing Statute, the Commissioner prescribed that returns be made by corporations for the calendar year 1918 on Form 1031-T and supplied said forms to all corporation taxpayers. The form required an estimate of the corporation's tax liability for said calendar year of 1918 and further provided that one-quarter of the tax estimated to be due must be forwarded by the taxpayer with said

Form 1031-T at the time it was filed. That form also contained the following statement:

> "An extension of forty-five days in the time allowed for filing a **completed** return is requested."

From the foregoing statutes which were in effect on March 14, 1919, when the Respondent filed document Form 1031-T, the Commissioner had authority to do one of two things: First, he could require the taxpayer to make a return on the form which he (the Commissioner) prescribed and at the time of filing said return require the payment of at least one-quarter of the tax shown to be due in such return; or, second, he could extend the time for filing a return, in which case the payment of the first installment must of necessity be postponed until the date of the expiration of the period of such extension. **No middle course was open to the Commissioner.**

It should be noted that the statute relating to an extension of time is not permissive but mandatory. If an extension is granted, payment of the first installment **shall be postponed.**

It of necessity follows that either the document filed by the Respondent on March 14, 1919, and accompanied by $75,000, as the payment of the first installment of the tax estimated to be due, was the return contemplated by the taxing statutes, or that in requiring said document to be filed and said money to be paid, the Commissioner has exceeded his authority.

It is a familiar principle of law that, where an official has acted, his act will be presumed to have been legally done. This is succinctly stated in volume 22 of Corpus Juris, at page 130, section 69 (c):

"There is always a presumption that official acts or duties have been properly performed, and in general it is to be presumed that everything done by an officer in connection with the performance of an official act in the line of his duty was legally done * * *."

See also cases therein cited in support of this propostion.

From which it necessarily folows that the return made on Form 1031-T could not have been merely a request for an extension of time for filing **the return** as is now contended by the Petitioner, but must have been **the return** required by the taxing statutes and hence the return which started the running of the period of limitations.

In the case of Brandon Corporation v. Jones, 33 Fed. (2d) 969, a case on all fours with the case at bar, the Court speaking of the tentative return says (p. 971):

"It is common knowledge that the Revenue Act of 1918 constituted the greatest single levy of any tax in the history of the country, and that the financial condition of the government was such that it could not permit any extension of time for the collection of the first installment. It was for its own benefit largely that the government devised the plan of tentative returns. This procedure established by the Commissioner of Internal Revenue under the rulings of February 13, 1919, and February 27, 1919, expressly required therefore the filing of a return on March 15, 1919, and expressly provided that there was no extension beyond that date of the time for the payment of the first installment. The Commissioner therefore elected not to grant any extension of time for filing these returns, and it necessarily follows that the returns which he then required must be deemed the return contemplated by the statute whether termed merely a tentative return or not."

2. Form 1031-T Was a Formal Document Prescribed and Furnished by the Commissioner, Containing Facts and Figures and Requiring Verification by the Principal Officers of the Taxpayer Corporation.

It is extremely significant that the Commissioner of Internal Revenue as a matter of practice has never issued a Regulation and has never demanded that a mere request for extension of time for filing a tax return be in any sense a formal document. An informal letter, or even a telegram, received from a taxpayer and stating most informally the reason for requesting an extension of time has, as a matter of practice, been deemed sufficient for this purpose by the Commissioner.

There is no requirement in the taxing statute itself that this request be in any sense a formal document, the only language in the statute pertaining to the matter being that quoted above, namely:

> "The Commissioner may grant a reasonable extension of time for filing returns, whenever in his judgment good cause exists."

On the other hand, Congress has prescribed in Section 239 of the Revenue Act of 1918 (quoted above) the specific requirements of a return. And the Petitioner is basing its argument that Form 1031-T cannot be the return required by the statute upon the contention that it did not conform literally to these requirements and did not state "specifically the items of its gross income and the deductions and credits allowed * * *."

Attention is called to the fact, however, that there is nothing in this section which required that all of this information must be contained within the four corners of any one particular document, and the re-

quirements of said Section 239 must be read together with the requirements of Section 1309, providing that the Commissioner shall make—

> "all needful rules and regulations for the enforcement of the provisions of this Act."

The Respondent contends that within the limits of reason the Commissioner may require the information with reference to the items of gross income and deductions and credits as provided in Section 239 on one or more prescribed forms, and may, if for the purpose of his office it is deemed advisable, provide different times for the filing of each of these forms. But since Congress has required the taxpayer to file but one return, it of necessity follows that the first document required by the Commissioner, and containing such facts and figures as he may require, is **the return,** and that the subsequent information merely completes or supplements the return.

This position is supported by the following cases:

National Refining Company, 1 B. T. A. 246.
Mabel Elevator Company, 2 B. T. A. 517.
Union Pacific Railroad vs. Bowers, 24 Fed. (2d) 788.
Thomas vs. United States, 22 Fed (2d) 1000.

Again quoting from the case of Brandon Corporation v. Jones (p. 972):

> "The law clearly contemplates, so far as the starting of the statute of limitations is concerned, but one return. That return may not be complete in all particulars. It may be the subject of amendment; but if it is presented bona fide, and is a return for any purpose under the statute, then it must be a sufficient return to start the running of the statute. The government cannot blow hot and cold. It cannot say to the taxpayer, 'File a paper which we know to be incomplete and does not give all the information

> required by law, and pay us the first installment and we will allow you later to complete your return, and readjust the amount of taxes in accordance with the completed return,' and then say later that 'the first paper which you filed was no return and the statute must start from the date of the final completed return.' It cannot say, when its interests require it to do so, that the tentative return is a return, and then, when its interests require the contrary, say that it is no return."

The situation is very analogous to the beginning of an action in court. The Declaration or Bill of Complaint originally filed by the Plaintiff often contains very little information as to the facts and circumstances which are the basis of the action. It may be necessary to amend these first documents very materially before the parties are at issue. But it never has been contended that legal proceedings have not commenced until all the required information has been filed in the court.

If it be urged that the figure given by the taxpayer as the estimated amount of its tax liability is so trifling and of so little consequence that it cannot be said to comply in any sense with the provisions of Section 239, attention is called to the instructions issued by the Commissioner just prior to the time set for filing these returns, and particularly to the following sentence therefrom:

> "It is urged by the Bureau that the estimates be computed on the most exact basis available."

The labor to a large taxpayer in making an estimate "on the most exact basis available" would be anything but trifling and might, in many instances, require said taxpayer accurately to estimate his gross income and his deductions and his credits, as is provided in Sec. 239, before he could comply with this

requirement. **Certainly, the Commissioner had no authority to require this exact computation merely as a condition precedent to granting an extension of time for filing a return.**

So the Commissioner in requiring the taxpayer to file the information sought by Form 1031-T, and in requiring the document to be properly authenticated by the proper officers of the taxpayer, again exceeded his authority unless the taxpayer was making its return. And the presumption of legality again applies and determines that Form 1031-T was **the return** required by the taxing statutes.

3. Since the Requirement Relating to The Return is Part of a Taxing Statute, any Doubt with Reference to the Effect of Acts Done Pursuant Thereto Must Be Resolved in Favor of the Taxpayer.

If, after a consideration of all the arguments that can be advanced, the Court should find it is in doubt as to whether or not Form 1031-T constituted **the return** described in the taxing statutes, the benefit of this doubt must be given to the taxpayer:

See Gould v. Gould, 245 U. S. 151, 62 L. Ed. 211.

Bowers v. New York & Albany Lighterage Co., 273 U. S. 346, 71 L. Ed. 676.

Eidman v. Martinez, 184 U. S. 578, 46 L. Ed. 697.

Schwab v. Doyle, 258 U. S. 529, 66 L. Ed. 747.

and so resolving this doubt in favor of the taxpayer, the Court will come to the conclusion that Form 1031-T was **the return** described in the taxing statutes and consequently was the return which started the running of the period of limitations.

Again quoting from Brandon Corporation v. Jones, supra, pages 972-3:

> "It must be borne in mind also that if there is any room for doubt as to the construction or application of these taxing statutes, such doubt is to be resolved in favor of the taxpayer."

To meet the foregoing arguments the Petitioner stresses the language of Section 239 of the Revenue Act of 1918, which provides for a return "stating specifically the items of its gross income and the deductions and credits allowed by this title". As was above pointed out, however, there is nothing in the foregoing language which requires that all these items must be contained within the four corners of any particular document. And furthermore Section 239 must be read in conjunction with Section 1309 of the same Act, which gives the Commissioner authority to make "all needful rules and regulations for the enforcement of the provisions of this Act." The Respondent therefore contends that when the Commissioner prescribed and furnished Form 1031-T the taxpayer was obligated to file this particular document; it was a "needful rule and regulations" for the enforcement of the provisions of the Act which the Commissioner was expressly authorized to make.

In support of its position the Petitioner further quotes at length in its brief (p. 12) from the case of Oak Worsted Mills against the United States. This case develops at length the argument that since Form 1031-T did not contain all the items seemingly required in Section 239, it could not be the return contemplated by the taxing statutes and contains this sentence, "It (Form 1031-T) specifically requested an extension of time for filing 'the return', and in this connection we are at a loss to understand what return could possibly be meant except the return re-

quired by law". The learned Court, however, overlooks the very significant fact that the taxpayer in Form 1031-T did not, as stated, request an extension of time for filing **the** return, but requested an extension of time "for filing a **completed** return".

The court in said Oak Worsted Mills case then goes on to say, "The statute provided that the tax shall be assessed within five (5) years 'after the return was due or made.' What return? The return not authorized by law and not referred to in the statute? Clearly not." It would seem that from this admittedly correct premise the court would have drawn the conclusion that since the Commissioner could require but one return, that therefore the return which he did require, namely, Form 1031-T, was **the return.** But it is submitted the court's reasoning is entirely faulty when from this premise the conclusion is drawn that since there is no provison in the law for a tentative return the Commissioner, in prescribing and requiring that form of return, was not requiring the return contemplated by the statutes.

In the opinion in the Oak Worsted Mills Case also the court repeatedly refers to the procedure prescribed in connection with Form-1031-T as "an invention of the Commissioner" and states that this plan "was a concession to the taxpayer beyond any requirement of the law." The Respondent respectfully inquires where in the taxing statutes any authority is given the Commissioner to make "inventions" and to "make concessions to taxpayers beyond any requirement of the law." The Commissioner is expressly authorized to make rules and regulations; he is not permitted to make "inventions" and "concessions".

But what concession can possibly be made to a taxpayer when he is required to estimate his tax liability

on "the most exact basis available" and to make payment of at least one-quarter of the amount shown in said estimate to be due? To call such a procedure a "concession" to the taxpayer is a misuse of language.

The procedure outlined by the Commissioner in connection with Form 1031-T was solely for the benefit of the Government, was prescribed to meet its needs and the act of the Commissioner done pursuant thereto are fully authorized by the taxing statutes, as is more fully developed in Petitioner's brief in the Florsheim case.

But the gist of the whole opinion in the Oak Worsted Mills case is set forth in the following sentence (government's brief p. 16), "The proposition on the part of the Commissioner was simply that if the taxpayer would file an estimate of his taxes and a request for extension of time for filing return and make payment of one-fourth of the estimated tax, the extension would be granted, **and he had a right to make these requirements.**" The fallacy of this statement has been developed at length in the foregoing brief. Congress did not give the Commissioner authority to require a taxpayer to file an estimate of his taxes as a condition precedent to granting an extension; it did not give the Commissioner authority to require the payment of one-fourth of the estimated tax due as such condition precedent; it expressly provided that if the Commissioner extended the time for filing a return the time was thereby extended for payment of any sum of money. Since the Oak Worsted Mills case is based on this false premise its conclusions should have no weight in the present case.

Cases similar to the Paso Robles case and the Wilmington Loan & Trust Company case (p. 17, government's brief), where a taxpayer makes a return

on an improper basis, have no application whatever in the present case except possibly to show that where the rules and regulations of the Commissioner are not complied with the so-called return is not operative to set in motion the period of limitations. And to push to its logical conclusion this line of reasoning would seem to support Respondent's position that where such rules and regulations of the Comissioner are in all respects complied with the return so filed would operate to set in motion the period of limitations.

The Petitioner argues (pp. 11, 12, government's brief) that because the tentative return did not set forth all the information the Commissioner might require for making an assessemnt that the period for assessment might expire before the necessary information was furnished. But attention is invited to the fact that Form 1031-T outlined a complete and perfect plan of procedure. It made a provision for a present estimate and payment and then made further provision for furnishing more detailed information, and the supplemental information furnished to give the Commissioner all the required data was filed nunc pro tunc as of the date of filing Form 1031-T. (See Appeal of National Refining Company, 1 B. T. A., 236.)

Furthermore, the condition suggested of the expiration of the time for making an assessment before the necessary information was furnished could never arise except by the negligence of the Commissioner, for the Commissioner has at all times under all tax statutes had the authority to examine the books of the taxpayer and if necessary to make a return for him.

The arguments above presented, together with those in Petitioner's brief in the Florsheim case, would seem

to make but one answer possible to the first question, viz: that the return filed by the Respondent on Form 1021-T was **the return** contemplated by the Statutes and that the period of limitations for assessment began at the time of filing this return.

If the Court so finds, the decision of the Circuit Court of Appeals for the 1st Circuit must be affirmed.

II.

In the discussion of the second issue it will be assumed, for purposes of argument, that the period of limitation began with the filing of the completed return, i. e., the return filed July 14, 1919.

In addition to the arguments advanced on this point in Petitioner's brief in the Florsheim case, Respondent suggests the following:

1. The So-Called "Waiver" of January 26, 1924, was a Contract Requiring Determination, Assessment and Collection of the Tax Prior to the Time when the Tax was Collected.

In the instant case the District Court expressly held that the so-called waiver was a contract. The Court's opinion to this effect is printed in full in Appendix A.

The first Revenue Act to provide for a consent to an assessment and collection of income taxes after the time prescribed in the statute of limitations was the 1921 Act, C. 136, 42 Stat. L. 227. The provision is the one in question here. It is contained in Section 250 (d), and its pertinent language follows:

> "* * * the amount of * * * taxes due under any return made * * * under prior income * * * tax Acts, * * * shall be

> determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment and collection of the tax; and no suit or proceeding for the collection of any such taxes * * * shall be begun, after the expiration of five years after the date when such return was filed * * * ."

Every subsequently enacted Revenue Act contains a provision for such a consent, except that the Act of 1924 provides for a consent as to a later assessment but not collection, and the Acts of 1926 and 1928 (the latter applying only to taxes for 1928 and later years) provide in separate sections for consents to assessment and collection, respectively, as will be discussed in detail below.

It will have been noticed from the above quoted excerpt from Section 250 (d) that the 1921 Act required the Commissioner of Internal Revenue, as well as the taxpayer, to "consent" as therein provided. If Congress had intended merely that the **taxpayer waive** the running of the statute—that he consent that the statutory period proper should extend, say, for six years instead of five years—it would have been sufficient simply to provide that the taxpayer file a waiver signed by himself alone. But the 1921 Act required the **Commissioner** to sign the paper, and in every later Revenue Act Congress has enacted the same requirement.

> Section 278 (c), Revenue Act of 1924 (C. 234, 43 Stat. L. 253, 299).
>
> Section 278 (c), (d) and (e), Revenue Act of 1926 (C. 27, 44 Stat. L. 2, 59).
>
> Section 278 (c) and (d), Revenue Act of 1926 as amended by Section 506 (a) of the Revenue Act of 1928, (C. 852, 45 Stat. L. 795, 870).
>
> Section 276 (b) and (c), Revenue Act of 1928 (C 852, 45 Stat. L. 795, 857).

The authorities are uniform to the effect that the signature of the Commissioner is essential to the validity of any paper executed pursuant to these provisions:

> Greylock Mills v. Commissioner, 31 Fed. (2d) 655 (C. C. A. 2d, April 1, 1929), where the Court found that the Commissioner had duly signed the document.
>
> Estate of Sherman v. Commissioner, 16 B. T. A. 786 (May 29, 1929).
>
> Chadbourn & Moore v. Commissioner, 16 B. T. A. 961 (June 10, 1929).

It must be supposed that Congress had a definite object in requiring the Commissioner's consent to the assessment or the collection of a tax after the expiration of the statutory period of limitation. The mere manual signing of thousands upon thousands of papers required by these sections of the statutes is no mean task. The Court of Claims has suggested, in the case of Stange v. United States (November 4th, 1929; 3 C. C. H., D-9399) that the reason for the requirement is that:

> "Congress did not intend that the Government should be bound in any way by the acceptance of waivers made by numerous collectors and revenue agents scattered all over the country, but only in case the agreement was signed by the Commissioner of Internal Revenue."

and that—

> "It was necessary for the orderly conduct of the Government's business that the Commissioner should have full knowledge of the action taken."

The statement in the last sentences does not explain the statutes if the intention was solely to provide a means of giving notice to the Government of a mere waiver by a taxpayer of the running of the statute of

limitations. It would have been simple enough to meet this requirement by providing that a waiver, signed only by the taxpayer, be **filed** in the office of the Commissioner of Internal Revenue. The explanation in the first sentence above quoted, however, seems to be the true one. Congress showed its intention that the Government should be **"bound"** by requiring the signature of the Commissioner. This conclusion is to be tested by consideration of the meaning of Section 250 (d) of the Revenue Act of 1921.

The construction of this section is made more certain by an examination of the equivalent sections of the Acts of 1924, 1926 and 1928, in which statutes the phraseology is clearer without change of substance in this particular. This aid to interpretation is utililized, and the method approved, in the following cases, among others:

Weedin v. Chin Bow, 274 U. S. 657 (1927), see pp. 667–668.

Tiger v. Western Investment Company, 221 U. S. 286 (1910), see pp. 308–309.

Wetmore v. Markoe, 196 U. S. 68, (1904), see pp. 76–77.

Johnson v. Southern Pacific Company, 196 U. S. 1 (1904), see pp. 20–21.

Cope v. Cope, 137 U. S. 682 (1891), see pp. 687–689.

Farmers' & Mechanics' National Bank v. Dearing, 91 U. S. 29 (1875), see p. 36.

Examination of the later Revenue Acts shows that Congress has held to a consistent purpose to require a real **agreement** between the Commissioner and the taxpayer as to a later assessment and collection than that specified in the statute of limitations.

Section 277 (a) and (a) (2) of the Act of 1924 is followed by Section 277 (a) and (a) (3) of the Act

of 1926 in setting up the period of limitation. It is by these sections provided that, except as stated in Section 278, the amount of income and profits taxes imposed by the Revenue Act of 1918 shall be assessed within five years after the return was filed and that no proceeding for collection shall be begun after the expiration of such period.

Section 278 (c) of the 1924 Act and Section 278 (c) of the 1926 Act provide in identical language that where both the Commissioner and the taxpayer have consented to an assessment after the time prescribed in Section 277, the tax may be assessed at any time, "prior to the expiration of the period **agreed** upon." Section 278 (d) of the Act of 1926 provides that where the assessment has been made within the statutory period of limitation the tax may be collected by means therein stated, but only if proceedings are begun within six years after the assessment or "prior to the expiration of any period for collection **agreed** upon in writing by the Commissioner and the taxpayer." Section 278 (e) of this Act provides that Section 278 shall not authorize the assessment or collection of a tax if, at the time of the enactment of the 1926 Act, such assessment or collection was barred by the statute, unless prior to the enactment of the Act "the Commissioner and the taxpayer **agreed in writing thereto.**" Section 506 (a) of the Revenue Act of 1928, amends Section 278 (c) and (d) of the Act of 1926, not changing any language thereof above quoted, but providing as to both an agreement relating to assessment and an agreement relating to collection, that, "The period so **agreed** upon may be extended by subsequent **agreements in writing** made before the expiration of the period previously **agreed** upon." Section 276 (b) and (c) of the 1928 Act, which relate only to taxes

for 1928 and subsequent years, are the same as Sections 278 (c) and (d) as so amended.

From these excerpts from the Revenue Acts, it is plain that Congress contemplated a real agreement for the assessment, or the collection, as the case may be, of 1918 income taxes after the expiration of the statutory period for assessment or collection and within a time fixed by the parties. Congress repeatedly speaks of the period "agreed upon"; Congress forbade the assessment or collection (pursuant to the 1926 Act) of a tax barred by the statute unless prior to the enactment of the 1926 Act the Commissioner and the taxpayer "agreed in writing thereto"; and in the very last Revenue Act enacted, Congress expressly permits the execution of subsequent "agreements" extending the prior period "agreed upon." It should be emphasized that all of these provisions relate to taxes for the year 1918 as well as other years.

The word "consent" is synonymous with "agree". It is derived from the Latin verb "consentire," "to feel together, agree." It is defined by the Funk & Wagnalls New Standard Dictionary (1919) to mean, "To give assent, as to a contract; agree", and by Webster's New International Dictionary (1928) as, "To agree; * * * . To indicate or express a willingness; * * *." It is obvious from the excerpts from sections of the later Revenue Acts that this was the meaning of Congress in using the word "consent" in Section 250 (d).

The clear import of the section is seen, therefore, when we use the word "agree" in its proper place and apply it to the act to which the parties are to agree, viz., to a later determination, assessment and collection. The meaning is that disposition of the tax liability must be made within five years after the filing

of the return unless both the Commissioner and the taxpayer agree to a postponement of the determination, assessment and collection until after the five year period has ended. The Commissioner as well as the taxpayer is to **agree** to a **later** settlement of the tax obligation than that provided in the statute. He is to furnish a quid pro quo for the taxpayer's agreement to give him further time.

Unless this construction is taken, the intention of Congress, as expressed in Section 278 (e) of the Revenue Act of 1926, that a post-statutory period assessment or collection should not be made unless the Commissioner and the taxpayer **"agreed in writing thereto"**; all of the statutory phraseology indicating the Congressional idea that an **agreement** is required; the very requirement that the **Commissioner** as well as the taxpayer consent to the postponement—all of these are rendered fatuous and meaningless. It is submitted that no other reasonable construction can be made of the numerous above quoted expressions of the Congressional intention.

This requirement that the Commissioner furnish such consideration for the taxpayer's agreement for further time is one that we might expect Congress to enact if we consider the conditions near the end of the statutory period of limitation. The fact that in every Revenue Act, beginning with that adopted in 1921, Congress has provided a means for postponing assessment and collection by agreement furnishes sufficient evidence that frequently the Commissioner is unable, for lack of time, to make a fair determination, assessment and collection of the tax before the end of the statutory period. Picture the Commissioner and the taxpayer in such a situation. The Commissioner is faced with the necessity of making a hasty and ill-judged determination and assess-

ment and (under the 1921 Act) of collecting the tax immediately unless further time is allowed him. This would mean contest and litigation, expense and delay in arriving at a final settlement of the true obligation and on refunds the Government would, under existing statutes, be required to allow interest at the high rate of 6%. On the assurance that a thorough-going consideration of his return would be made, the taxpayer would be willing to agree to further time. Congress met the situation by providing for an agreement between the taxpayer and the Commissioner, allowing further time to the Commissioner and guaranteeing to the taxpayer that the determination should be well considered by requiring that it be **after** the end of the admittedly too brief remainder of the statutory period. It is submitted that this is a sound construction of the Act.

In this connection attention is called to paragraph 5 of the agreed statement of facts under which this case is submitted (R. p. 15), which states "That on January 26 the Plaintiff and the Commissioner of Internal Revenue **entered into an agreement** entitled 'Income and Profits Tax Waiver' * * *."

The agreement of January 26, 1924 (Exhibit "B", R. p. 11) was subject to all of the connotations of the statute as they have been outlined above. If this were not so, then the document would have no effect, for the statute provides that 1918 taxes shall be determined and assessed within five years after the filing of the return **unless** both the Commissioner and the taxpayer make the agreement which has been described and that no proceeding for the collection of such taxes shall be begun after the expiration of the five years. Therefore, if the document dated January 26, 1924, is not such an agreement, the time within which an assessment and collection of the tax

here in question might be made expired at the end of five years after the return was filed.

The effect of this agreement is that the determination, assessment **and collection** of the tax should be made, at the latest, on or before July 13, 1925. This document is not a mere waiver by the taxpayer, extending the strict statutory period of limitation. Furthermore, there is not one word in any taxing statute authorizing a waiver which shall extend the statutory period of limitation. Everywhere the subject is mentioned the reference is to a consent or agreement to a later assessment or collection, as the case may be. The inference is clear that a real agreement was intended, binding upon and giving rights to the Commissioner and the Respondent. The limitation period of five years set by the statute expired not later than July 13, 1924. Any assessment or collection to be made after that period ended was to be exclusively dependent on the agreement.

If this were not so, if the execution of the paper constituted a mere extension of the statute and the taxpayer thereafter remained subject to any further legislation affecting the statute of limitations, there would be a discrimination in favor of those taxpayers whose cases were reached by the Commissioner and disposed of before the end of the five-year period, without the execution of agreements such as the one in question here. In the case of such taxpayers no assessments could be made, except in case of fraud, whereas those whose returns were not audited, with a final settlement of claims for additional taxes made, before the five years expired, and who voluntarily executed agreements for a later determination, assessment and collection of any tax due would be subject to uncertainty as to whether, during the period of the waiver, Congress might remove or extend the bar of

the statute so that an assessment might be made after the period of the waiver and the controversy with the Commissioner be never quieted.

Congress did not intend such a situation. Congress did not provide for a general extension of the statutory period, but authorized the making of individual agreements with individual taxpayers providing for the determination, assessment and collection of taxes in accordance with the law then existing, but at a later time. It is obvious that there was no intention to leave these agreements open to later legislation changing the basis and method and time of assessment and collection. If the contrary construction were placed on the law in question it would greatly discourage the execution of such agreements. Taxpayers would prefer to pay the additional amounts claimed, sue for the recovery thereof, and allow the running of the statute to quiet any further questioning of the tax liability. Thus the purpose of Congress would be defeated.

The same reasoning rebuts the Government contention that the agreement was made under an "implied" understanding that it should be subject to future legislation. Furthermore, the agreement is **definite** on the point that the determination, assessment and collection should be made within one year after the expiration of the statutory period of limitation—that is to say, within six years from the beginning of the statutory period. It would be a startling proposition to say that this part of the stipulation was unimportant and was made with a view to a possible **additional period** of six years for collection.

It is clear, therefore, that the document dated January 26, 1924, was a contract, duly provided for by Congress, pursuant to which the Commissioner of

Internal Revenue and the Respondent agreed that the determination, assessment and collection of any tax for the year 1918 should be effected on on before July 13, 1925, at the latest.

2. Congress Could Not by Subsequent Legislation Constitutionally Alter the Terms of the Contract of January 26, 1924.

The Government contention to the contrary is predicated on the assumption that even though there is a contract obligation requiring the determination, assessment and collection of the tax within a certain time, the time may be extended by later legislation changing the period of limitation. But this point cannot be sustained, because, although it may be true that the legislature may properly extend or remove the statute of limitations applicable to the enforcement of an ordinary contractual obligation—Campbell v. Holt, 115 U. S. 620 (1885)—it does not follow that **where the contract itself fixes the period of limitation,** the bar may be extended or removed by legislative enactment. New York Central Railroad Company v. Lazarus, 278 Fed. 900 (C. C. A., 2d, 1922). In this case the contract (a bill of lading) fixed a two-year limit. The plaintiff, being barred by this provision, contended that the Transportation Act of 1920 suspended the limitation during the period of Federal control. The Circuit Court of Appeals for the Second Circuit held that the Transportation Act was not intended to suspend the limitation period in such a case and that if the Act was intended to effect such a result the legislation would be in violation of the Fifth Amendment of the Federal Constitution.

The circumstance that the Government of the United States is a party to the contract in the case at bar does not affect the conclusion. The Govern-

ment is subject to the substantive law as to contract rights and liabilities to the same extent as a citizen. It may not deprive a citizen of his property without due process of law by changing the terms of his contract, and this principle is peculiarly applicable where the Government is a party to the contract.

The respondent's position on this point is sustained by the Sinking-Fund Cases, 99 U. S. 700 (1878.) Briefly stated the facts there were that contracts had been made between the Government and the Union Pacific Railroad Company and the Central Pacific Railroad Company pursuant to which the two companies agreed to pay to the United States, at a certain date, the amount of certain "subsidy bonds", and to apply toward the liquidation of the debt, as earned, one-half of their compensation for services in carrying troops and mail for the Government and also 5% of net earnings; but by subsequent statute provision was made that the other half of such compensation, and the amount of 25% of net earnings, should be paid into a sinking fund to be held by the Government as security for the payment of the indebtedness. One railroad sued in the Court of Claims to recover amounts of compensation for services credited to the sinking fund, and a stockholder of the other company sued the company to compel it to comply with the subsequent statute.

The opinion of the Court was divided. That of the five justices constituting the majority was delivered by Mr. Chief Justice Waite. At the very beginning of the opinion the Court **accepts** the doctrine that the Government cannot constitutionally repudiate the terms of a contract by which it is bound with a citizen, using the following language:

> "The single question presented by the case of the Union Pacific Railroad Company is as to the

constitutionality of that part of the Act of May 7, 1878, which establishes in the treasury of the United States a sinking-fund. * * *

"They (the United States) are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, but equally with the States they are prohibited from depriving persons or corporations of property without due process of law. They cannot legislate back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of its railroad. **Neither can they by legislation compel the corporation to discharge its obligations in respect to the subsidy bonds otherwise than according to the terms of the contract already made in that connection. The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen.** No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable.

"* * * The precise point to be determined now is, whether a statute which requires the company in the management of its affairs to set aside a portion of its current income as a sinking-fund to meet this and other mortgage debts when they mature, deprives the company of its property without due process of law, or in any other way improperly interferes with vested rights." (pp. 718–719.)

The majority of the court held that Congress had expressly reserved, in the prior legislation which was considered to be the original contract, the right to make the change which was complained of, and that

accordingly the railroads were not deprived of their property in violation of the Fifth Amendment.

There were dissenting opinions by Mr Justice Field, Mr. Justice Strong and Mr. Justice Bradley on the ground that the contract did not contain such a reservation of the power to make the change in question. All three of the dissenting justices, therefore, were of the opinion that the railroads had been deprived of their property without due process of law (pp. 737–8; 746–7; and 766). Two of the justices were furthermore convinced that, although there is no express constitutional prohibition on the point, Congress is not by the Constitution permitted to pass any law imparing the obligation of a contract, entirely apart from the provision of the Fifth Amendment (pp. 736–737 and 762–766).

The significant point in this case is that all of the eight justices participating in the decision were agreed on the one conclusion that Congress may not alter the terms of a contract between the Government and a citizen without violation of the Federal Constitution.

The **Sinking-Fund Cases** directly refute the contention of the Government in the case at bar that the 1924 Act changed the terms of the so-called "waivers" in effect at the time of its enactment. Such waivers, we have seen, were, in accordance with the clearly expressed intention of Congress, contracts between the Government and the taxpayers providing that a determination, assessment and collection of taxes for particular years should be made on or before certain dates. Any determination, assessment or collection made within the period fixed by such a contract would be exclusively dependent on the contract for its validity. There is no reason, from the fact that the subject was taxes, that such a contract should not be

made. It has frequently been held that the sovereign power of the states relating to taxation may be limited by contracts exempting property or persons from the future imposition of taxes.

New Jersey v. Wilson, 7 Cranch 164 (1812).
Home for the Friendless v. Rouse, 8 Wall., 430 (1869).
Murray v. Charleston, 96 U. S. 432 (1877).

The power of Congress may similarly be limited by contracts made pursuant to statute; in fact such limitations have been provided in certain Liberty Bond issues; and the validity of such contracts has been impliedly recognized in the case of National Life Insurance Company v. United States, 277 U. S. 508 (1928). If a government may provide for contracts limiting the very **power** to tax in the future, there is no reason it may not authorize a contract fixing a time within which a particular tax may be **assessed and collected.**

If Congress may change the terms of a contract providing for a determination, assessment and collection of a tax within a certain time, it may provide that the **determination and assessment** may be made any number of years later than the date set therein. The great prejudice to the taxpayer in such event is obvious. In the case at bar it is only the date for collection which it is claimed was changed by the subsequent statute. But the prejudice to the respondent would be as serious as that resulting from a change in the time for determination and assessment. The time remaining for a collection of the tax pursuant to the contract in this case was about one year, and the Government contends that the 1924 Rct extended this time so that the Government might make a collection at any time during a further period of

nearly six years. Such a change would render useless any plans the respondent may have made to meet the financial demand upon it, and would seriously affect its ability to produce the necessary witnesses, and evidence generally, in the event that it should desire to contest the propriety or legality of the collection when made. It should be remembered that the tax in question is alleged to have been due upon income for the year 1918; and that **the Government contends that the 1924 Act would have permitted a collection at any time up to the 17th day of March, 1931, or more than twelve years after the end of the taxable year.**

The effect of the agreement between the respondent and the Government was that the assessment and the collection should be made on or before July 13, 1925, at the very latest. But, nearly a year and one-half after this date, the Government seized the respondent's property to enfore collection (R. p. 16). There could hardly be a clearer case of deprivation of property without due process of law.

To meet the foregoing arguments the Government contends that the so-called waiver executed by both the Commissioner and the taxpayer should not be construed as constituting a contract, but "is merely a consent in writing * * * to the extension of the statutory period for the assessment of the taxes." Respondent respectfully suggests that to argue that a consent in writing executed by both parties is not a contract is to quibble over terms, which can serve no useful purpose.

The case of Bank of Commerce against Rose (government's brief p. 21), like the Circuit Court decision in the Florsheim case, is based on the erroneous premise that the so-called waiver in some way oper-

ates to extend the poriod of limitation provided by the statute and furthermore assumes that authority to do so is given by the taxing statutes. Since this is dealt with fully and completely in Petitioner's brief in the Florsheim case, no further argument will be advanced to show its fallacy. The case of Loewer Realty Company against Anderson (government's brief p. 21) is obviously not in point. The Respondent, however, is very glad to adopt the language of that case quoted by the government that "The taxpayer should not in any event be allowed to repudiate a consent upon which the Commissioner has relied." By the same token the Commissioner should not in any event be allowed to repudiate a consent upon which the taxpayer has relied. Although the Petitioner in its brief (at p. 22) cites the case of Stange v. United States, recently decided by the Court of Claims, it is not quite clear how this case can be said to support our Petitioner's position. So far as the Stange case has any application it is to the effect that waivers signed by both the Commissioner and the taxpayer constitute contracts between the parties and are presumably binding on the parties.

CONCLUSION.

In conclusion the Respondent's contentions may be summarized as follows:

1. The additional taxes involved in this case were illegally collected because they were not assessed within the period of time provided by law for their assessment.

2. The additional taxes involved in this case were illegally collected because they were not collected within the period of time provided by agreement or by law for their collection.

It is therefore respectfully submitted that the judgment of the Circuit Court of Appeals for the First Circuit should be affirmed.

Respectfully submitted,

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APPENDIX A.

HOOD RUBBER CO. vs. WHITE, COLLECTOR
28 Fed. (2d) 54.

Lowell, District Judge:

These were two actions to recover Income and Excess Profits taxes for the years 1918 and 1919, paid under protest. The facts are similar and it was agreed at the hearing that the determination of one of them would carry with it the decision of the other.

On March 14, 1919, the Plaintiff filed an estimated return of profits for the year 1918 in the sum of $300,000 and paid at the same time the first quarterly installment of $75,000. The return was made out on a paper called a "Tentative Return and Request for Extension of Time". The time for filing a completed return was twice extended, the last date being July 14, 1919. In the meantime, the Commissioner had demanded and the Plaintiff had paid a second quarterly installment of $75,000. The completed return was filed on July 14, 1919. On January 26, 1924, the Plaintiff and the Commissioner came to an agreement extending the time of assessment and collection of the taxes for one year beyond the statutory period of limitation (five years in all). This instrument was as follows:

"January 26, 1924.

"Income and Profits Tax Waiver

"In pursuance of the provisions of Subdivision (d) of Section 250 of the Revenue Act of 1921, Hood Rubber Company and affiliated companies of Watertown, Massachusetts, and the Commissioner of Internal Revenue hereby consent to the determination, assessment, and collection of the amount of Income, Excess Profits, or War Profits taxes due under any return made by or on behalf of the said companies for the year 1918 under the Revenue Act of 1921, or under prior Income, Excess Profits, or War Profits Tax Acts. * * * This waiver is in effect from the date it is signed by the taxpayer and will remain

in effect for a period of one year after the expiration of the statutory period of limitation or the statutory period of limitation as extended by any waivers already on file with the Bureau within which assessments of taxes may be made for the years mentioned."

The Commissioner assessed the taxes on March 18, 1925, and collected them by distraint on December 15, 1926.

The Plaintiff contends that the taxes were illegally assessed and collected as both the assessment and collection were made after the expiration of the time allowed by the waiver.

Two questions arise:

FIRST—Was the assessment made in time; and

SECOND—Was the tax collected in time?

The first question depends upon the meaning of the word "return" as used in the statute. The waiver construed in connection with the statute allowed five years from the return in which to make the assessment. If the word "return" refers to the tentative return, the Government did not assess the tax in time. If, however, it refers to the completed return, the assessment was made within the required five years. This question, which is not free from doubt, need not be decided as even if it be granted that the assessment was made in time, the tax was not collected within five years from the date of the completed return.

1. The Government's contention that the waiver did not limit the time for the collection of the tax to six years is unsound. The Government takes advantage of the six year period for assessment and then says that the six year period for collection was changed by the later statute of 1924, which allowed six years for collection. The Government cannot have its cake and eat it, too. Either the waiver conferred no power on the Government to make the assessment later than the statutory period allowed or it set up a six year restriction on collection as well as assessment. It is distinctly unfair for the Government to take advantage of one part of the waiver and refuse to be bound

by the other part of it. The statement made in the Government's brief and in some of the cases—that the waiver was made by the taxpayer and the Commissioner with future statutes in view—seems far fetched. A distinct limitation of six years (one year more than the period then prescribed by statute) was expressly put in the waiver, showing that the five-year period was a matter of importance to both sides. As the taxing statutes were being changed at nearly every session of Congress, the parties would undoubtedly have referred to future taxing acts had they had them in mind.

The Government cites cases to the effect that "No officer of the Government has the right to waive a statute of limitations in favor of the United States". See for instance De Arnaud v. United States, 151 U. S. 483. These cases are sound law, but they apply only to statutes of limitation then in force and not the ones which are prescribed by Congress in later acts. In this case the Commissioner did not waive a statute of limitation. It was the taxpayer who waived it and gave more time to the Commissioner to assess and collect the taxes.

2. The Government also contends that Congress had the power to change the time for collection set up by the waiver without thereby infringing any of the Plaintiff's constitutional rights. This argument is unsound. It was to the advantage of both parties that the period of limitation be extended and it was of especial advantage to the Plaintiff that it should know when the taxes might be considered as unenforcible so that it might properly arrange its financial affaris. This seems to be clearly a cose of a binding contract which cannot be varied by subsequent legislation. C. & N. W. Ry. Co. v. United States, 104 U. S. 680.

The Government cites certain paragraphs from the opinion of the Board of Tax Appeals in Sunshine Coat & Suit Company, Petitioner, v. Commissioner, 10 B. T. A. 971, in support of it contention in the present case. That case was rightly decided as the collection of the tax was not mentioned in the last two of the

three waivers which were there in suit, so that the assessment having been made in time, the provisions of the Act of 1924—allowing collection to be made within six years of a valid assessment—came into force. The passages in the opinion cited by the Government were not necessary to the decision in the case and, therefore, do not carry with them as much weight as if they were not obiter dicta.

Judgment for the Plaintiff.